PROGRESS OF THE LAW.

As Marked by Decisions selected from the Advance Reports for January.

Banks and Banking, Receiving Deposits When Insolvent, Constitutional Law

The Supreme Court of Illinois has recently made a very thorough examination of the act of that state of June 4, 1879, P. L. 113, which enacts (§ 1) that "If any banker or broker or person or persons, doing a banking business, or any officer of any banking company, or incorporated bank doing business in this state, shall receive from any person or persons, firm, company, or corporation, or from any agent thereof, not indebted to said banker, broker, banking company, or incorporated bank, any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery, when at the time of receiving such deposit, said banker, broker, banking company, or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositors, said banker, broker, or officer so receiving said deposit, shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined, in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto, may be imprisoned in the state penitentiary, not less than one nor more than three years. The failure, suspension, or involuntary liquidation of the banker, broker, banking company, or incorporated bank within thirty days from and after the time of receiving such deposit, shall be *prima facie* evidence of an intent to defraud, on the part of such banker, broker, or officer of such banking company or incorporated bank." This it holds to be constitutional, not being a deprivation of property without due process of law, in that it curtails an inherent right to contract, nor violating the provision that the right of trial by jury shall remain inviolate, nor that that no person shall be deprived of life, liberty, or property without due process of law.

It was also held that an indictment under this act alleging that the accused corruptly, wilfully, fraudulently and feloniously received a deposit, etc., was sufficient, without specifically alleging that the deposit was received with intent to defraud; that an allegation that the accused, "being persons then and there doing a banking business . . . . did receive" from one D. certain moneys, of the property of said D., the said D. then and there not being indebted to the accused, sufficiently alleged that the accused were doing a banking business, and that the moneys were received as a general deposit; and that an indictment alleging that the accused were doing a banking business under the name of "Meadowcroft Bros.," and that they were insolvent at the time they received the deposit, was sufficient, without alleging that the partnership of Meadowcroft Bros. was insolvent, as a partnership is not a legal entity, independent of the persons composing it.

Indictment, Sufficiency

It was further held that the crime denounced by the act is consummated when the banker receives the deposit, and is unable, by reason of his insolvency, to repay the entire sum deposited; that it is not necessary to demand the return of the deposit, when the day after the deposit a receiver was appointed for the bank, which was hopelessly insolvent; that a deposit was lost to the depositor, so as to warrant a conviction of the banker for receiving it, though pending the prosecution therefor the full amount of the depositor's claim was tendered to him; and that a general verdict fixing the amount of the fine (which by the act is double the amount of the deposit,) and the term of imprisonment, without finding as to the amount of the deposit, was valid: *Meadowcroft* v. *People*, 45 N. E. Rep. 303.

Liability under Act

"Loss" of Deposit

Verdict

Statutes of this kind are to be found in most, if not all of the states of the Union, and it has been uniformly held that the provision that subsequent failure shall be *prima facie* evidence of insolvency at the time of the receipt of the deposit does not render them unconstitutional: *State* v. *Beach*, (Ind.) 43 N. E. Rep. 949, 1896; *State* v. *Buck*, 120 Mo. 479, 1894.

In order to sustain a conviction, the state must prove beyond a reasonable doubt

(1) Actual insolvency at the time the money is received;

(2) The defendant's knowledge of the insolvency;

(3) The receipt of the money as a bank deposit: *Commonwealth* v. *Junkin*, 170 Pa. 194, 1895, reversing 16 Pa. C. C. 116, 1895.

When a banker or officer of a bank receives money over the counter at a time when he knows the bank to be insolvent, but keeps it separate from all other funds, with the intention of returning it, and actually does return it, he cannot be convicted of a criminal receipt of the money as a bank deposit; and if a clerk, against the order of the defendant, receives a deposit and fails to keep it separate, but the next day the amount of the deposit is returned to the depositor by the banker, the latter is not guilty: *Commonwealth* v. *Junkin*, 170 Pa. 194, 1895, reversing 16 Pa. C. C. 116, 1895. It is not necessary, however, to constitute a violation of the statute, that the deposit should be received in the bank building or rooms; a receipt of money on deposit for the bank outside of its rooms is sufficient: *State* v. *Yetzer*, (Iowa,) 66 N. W. Rep. 737, 1896; *State* v. *Smith*, (Minn.) 64 N. W. Rep. 1022, 1895. And it is not necessary that the defendant should receive it himself; if any one under his authority, as a cashier or clerk, receives it, he is liable: *State* v. *Cadwell*, 79 Iowa, 432, 1890. Partners who are bankers may accordingly be jointly guilty of committing the offence denounced; one by directing, aiding or advising, the other by actually receiving the deposit: *State* v. *Smith*, (Minn.) 64 N. W. Rep. 1022, 1896. Under the Missouri statute, which provides, that "if any officer . . . . shall create or assent to the creation of any debts or indebtedness by any such bank . . . . in consideration of or by reason of which indebtedness any money or valuable property shall be received into such bank, he shall be guilty of larceny," (Rev. Stat. Mo. 1889, § 3581,) it has been held that it is the duty of an officer, on becoming aware of the failing condition of the bank, to revoke the authority of any employe under him and subject to his authority to receive any further deposits; and

his failure to do so will be construed as a continuing authority to receive them, and as an assenting thereto: *State* v. *Sattley*, 131 Mo. 464, 1895.

A firm engaged in banking is insolvent, within the meaning of these statutes, when it is unable to meet its liabilities as they become due in the ordinary course of business; and bankers who receive deposits, knowing themselves to be thus insolvent, cannot escape the penalty of the law on the ground that they believe that, with time and indulgence, they can settle all demands: *State* v. *Cadwell*, 79 Iowa, 432, 1890. A deposit is "lost" to the depositor, whenever it cannot be repaid on demand, owing to the insolvency of the bank: *State* v. *Beach*, (Ind.) 43 N. E. Rep. 949, 1896.

The mere act of receiving a deposit when insolvent does not constitute the offence. Without any special provision to that effect, the Supreme Court of Nebraska has held that the statute of that state forbidding the receipt of deposits by an insolvent bank, ought not to be construed to render an officer of a banking association guilty of a crime for permitting a debtor of the association to pay his debt thereto, even though the association is at the time, to the officer's knowledge, insolvent; and that the rejection of evidence tending to show that the deposit was received in payment of a debt to the bank is error: *Nichols* v. *State*, (Neb.) 65 N. W. Rep. 774, 1896. To the same effect is *Commonwealth* v. *Schall*, 12 Pa. C. C. 209, 1892; *Commonwealth* v. *Delamater*, 2 D. R. (Pa.) 118, 1892. But the indebtedness of a depositor to the bank, within the meaning of the exception in the statute, must be such that the bank has a legal right to apply the deposit thereon, such as a matured obligation, so that the depositor has no right to have the deposit repaid on demand, and it is consequently not "lost" to him by the bank's insolvency: *State* v. *Beach*, (Ind.) 43 N. E. Rep. 949, 1896.

The officers of national banks are amenable to these statutes, since Congress has not by any legislation declared it to be criminal to receive a deposit knowing or having reason to believe the bank insolvent, and its exclusive jurisdiction has therefore not attached: *State* v. *Bardwell*, 72 Miss. 535, 1895;

and further, such acts are not void on the ground that they are attempts to control and regulate the business of national banks, and to prescribe a condition on which deposits may not be received: *State* v. *Fields*, (Iowa,) 62 N. W. Rep. 653, 1895. The owner of a private bank is liable, though he is doing an unauthorized business, not having complied with the requirements of the statute in the organization of his bank: *State* v. *Buck*, 108 Mo. 622, 1891; *State* v. *Buck*, 120 Mo. 479, 1894; but a trust company, not authorized to receive deposits, is not a bank or banking institution within these statutes, though it has and exercises some of the functions of a bank; and the fact that it receives deposits subject to check in violation of its charter, does not render it a banking institution, so that its officers are amenable thereunder: *State* v. *Reid*, (Mo.) 28 S. W. Rep. 172, 1894.

An indictment, though charging the offence in the exact language of the statute, is fatally defective if it fails to aver the essential fact that the bank was actually insolvent: *State* v. *Bardwell*, 72 Miss. 535, 1895; and in case of a general partnership, it must be averred that both the partnership and the individuals composing it are insolvent; but in case of a special partnership the averment of the insolvency of the firm alone is sufficient: *Commonwealth* v. *Delamater*, 2 D. R. (Pa.) 118, 1892. Unless the statute so provides, however, the indictment need not allege that loss occurred to any one by reason of the receipt of the deposit: *State* v. *Myers*, 54 Kans. 206, 1894. A charge that the defendants were "engaged in the business of carrying on a private bank," does not sufficiently allege that they were "bankers" within the meaning of the act: *Commonwealth* v. *Delamater*, 2 D. R. (Pa.) 118, 1892. Under the Missouri statute, which makes it a criminal offence for any officer of a bank to "receive or assent to the reception of any deposit of money," etc., knowing the bank to be insolvent, a conviction cannot be had on an indictment which merely charges that the defendant did "receive" the deposit, on proof that he "assented" to the reception thereof; the two offences are distinct: *State* v. *Wells*, (Mo.) 35 S. W. Rep. 615, 1896; and if the indictment charges that money was received "on

deposit and for safe-keeping," it must be proved that the money was received for safe-keeping, or as a special deposit, and proof of a general deposit is insufficient: *Koetting* v. *State*, 88 Wis. 502, 1894.

In prosecutions under these acts, a deed of assignment made by the defendant, under the general assignment law, the inventory, appraisement, and all proceedings had thereunder, are competent evidence on the question of the defendant's insolvency; *State* v. *Beach*, (Ind.) 43 N. E. Rep. 949, 1896; *State* v. *Cadwell*, 79 Iowa, 432, 1890. So, evidence that depositors demanded their money, and that the bank employes refused to pay them, is competent to show the failure of the bank to meet its obligations in the ordinary course of business, and this, whether the defendant personally heard the demands or not: *State* v. *Sattley*, 131 Mo. 464, 1895. A bank is not necessarily insolvent, however, because it does not retain on hand all of the money of its depositors; its is not expected to pay all its depositors at once, but simply to pay or provide for its deposits and other debts as they are demanded in the usual course of business; *State* v. *Myers*, 54 Kan. 206, 1894; and in deciding the question of solvency, the capital stock and surplus fund of a bank are not to be considered as liabilities tending to show insolvency. The capital and surplus are resources, which may be used to pay depositors and other creditors when there has been loss by loans or otherwise: *State* v. *Myers*, 54 Kan. 206, 1894.

The opinion of a witness as to the insolvency of the bank is not admissible. The actual facts concerning the condition of the bank at the time of the deposit must be shown: *State* v. *Myers*, 54 Kan. 206, 1894. But an expert accountant, who has examined the books of the bank, with reference to its solvency, at different times, may, in connection with the *data* upon which his opinion is founded, testify as to his opinion concerning the solvency or insolvency of the bank: *State* v. *Cadwell*, 79 Iowa, 432, 1890.

An instruction that a bank is not insolvent so long as it is meeting its liabilities as they become due in the ordinary course of business, and there is reasonable expectation on the

part of the officers familiar with its affairs that it will continue to do so, is correct: *Minton* v. *Stahlman*, (Tenn.) 34 S. W. Rep. 222, 1896; and so is one that the failure of the bank "is *prima facie* evidence of the knowledge on the part of its cashier that the same was in failing circumstances," when it is explained that "*prima facie* evidence is such that it raises such a degree of probability in its favor that it must prevail unless it be rebutted or the contrary be proved:" *State* v. *Sattley*, 131 Mo. 464, 1895. When the deposit is in fact received by a cashier or clerk, it is sufficient to instruct the jury that the deposit must have been received on the authority of the defendant, and that he must have received it knowing of his insolvency: *State* v. *Cadwell*, 79 Iowa, 432, 1890.

The Iowa statute, (McClain's Ann. Code Iowa, §§ 1824, 1825,) differs from some others, in that it makes it an offence for "any officer or managing party" of the bank, who, knowing of its insolvency "shall knowingly permit the receiving of any such deposit as aforesaid." Under this statute it has been held, that an officer of an insolvent bank, who, knowing of its insolvency, permits or connives at the receiving of deposits, is guilty of the offence described, whether he is a managing party or not; that when the deposit in question is not received personally by the officer charged with the offence, it is not necessary that the person who actually receives it knows that the bank is insolvent, if the defendant knew it, and allowed such person to receive it for the bank; and that when an officer of a bank, knowing the bank to be insolvent, assists and advises the keeping of the bank open for the receipt of deposits, and while it is so kept open a deposit is received, that officer is guilty under the statute, though the deposit is actually received by another: *State* v. *Yetzer*, (Iowa,) 66 N. W. Rep. 737, 1896. Accordingly, it is proper to charge on the trial of a banker for receiving deposits when insolvent, that, though the deposit was received by the defendant's son, after the defendant had instructed him to refuse deposits, if the defendant, on learning that the deposit was so received, placed it among the funds of the bank, he knowingly accepted and received it: *State* v. *Eifert*, (Iowa,) 65 N. W. Rep. 309, 1895.

The provision that subsequent failure shall be *prima facie* evidence of insolvency applies to civil actions to recover the deposit, as well as to criminal prosecutions: *American Trust & Sav. Bk.* v. *Gueder & Paeschke Mfg. Co.*, (Ill.) 37 N. E. Rep. 227, 1894.

Carriers, Liability for Money Stolen

The liability of a steamboat company with respect to the property of its passengers is analogous to that of an innkeeper; and it will therefore be liable, without proof of negligence, if money for traveling expenses, carried by a passenger on a steamboat, is stolen from his stateroom at night, without negligence on his part: *Adams* v. *New Jersey Steamboat Co.*, (Court of Appeals of New York,) 45 N. E. Rep. 369, affirming 29 N.Y. Suppl. 56.

Constitutional Law, Due Process of Law

A statute making such an unreasonable reduction in the rates of toll charged by a turnpike company as will prevent it from maintaining its road, out of its receipts, in proper condition for public use, or from earning any dividend on its stock, is repugnant to the constitutional provision that no person shall be deprived of property without due process of law: *Covington & Lexington Turnpike Road Co.* v. *Sandford*, (Supreme Court of the United States,) 17 Sup. Ct. Rep. 198.

An order made by a state court, under authority of a statute, requiring a railroad company to surrender a portion of its right of way to private individuals, as a site for an elevator to be erected and maintained by such individuals for their own benefit, amounts to a taking of private property by the state without due process of law: *Mo. Pac. Ry. Co.* v. *State of Nebraska*, (Supreme Court of the United States,) 17 Sup. Ct. Rep. 130, reversing 29 Neb. 550.

Liberty of Contract, Mechanics' Lien, Subcontractors

The Supreme Court of Ohio has lately declared unconstitutional the act of that state of April 13, 1894, p. 135, in so far as it gives a lien upon the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor, irrespective of the contract between the owner and the contractor, on the ground that the

liberty to acquire property by contract can be restrained by the legislature only so far as such restraint is for the common welfare and equal protection and benefit of the people. All to whom the contractor becomes indebted in the performance of his contract are bound by the terms of the contract between him and the owner: *Palmer* v. *Tingle*, 45 N. E. Rep. 313.

Exclusive Rights

The Supreme Court of Missouri, Division No. 2, has recently decided, in *State* v. *Walsh*, 37 S. W. Rep. 1112, that the act of Missouri of March 12, 1895, which prohibits pool selling except "on the premises or within the limits or enclosure of a regular race course," is unconstitutional, being a violation of the provision of the constitution forbidding the enactment of special laws granting exclusive rights, privileges, or immunities.

Contempt, Inherent Power of Court, Legislative Interference

The Supreme Court of Ohio has ranged itself on the side of those who hold that the legislature has no authority to abridge the power of a court created by the constitution to punish contempts summarily, since such power is inherent, and necessary to the exercise of judicial functions; and accordingly refused to adopt a construction of the Revised Statutes, (§§ 6906, 6907,) which would impute to the legislature an intention to abridge that power: *Hale* v. *State*, 45 N. E. Rep. 199.

Removal of Witness

In the same case it was also decided, overruling *Baldwin* v. *State*, 11 Ohio St. 681, 1860, that removing a witness from the county of his residence, where he was under *subpœna* to attend upon the trial of a cause pending, with the purpose and effect of preventing his appearance upon the day of trial, being a wrongful act, which obstructs the administration of justice, is a contempt of court.

Deeds, Delivery, Not to take Effect till Death

The Supreme Court of Indiana, in *Stout* v. *Rayl*, 45 N. E. Rep. 515, has adopted the rule that when a deed is delivered by the grantor to a third person, to be delivered to the grantee on his death, and the grantor parts with all dominion over it, and reserves no right to recall it or alter its provisions, the title passes at

the time of the delivery of the deeds to the depositary. The question arose upon the following state of facts. One S. delivered to his wife deeds executed by himself and her, with directions to keep them until his death, and then deliver them to W. The deeds were placed in an envelope, and indorsed, "Deeds to be delivered by W. after my death;" and on each deed were the words, "After my death, this deed to be delivered by W." After S.'s death, W. delivered the deeds to the grantees named therein; and it was held that the deeds were not invalid, as an attempt by the grantor to make a testamentary disposition of the land, without the legal formalities of a will.

The cases on this subject are collected in an annotation in 33 AM. L. REG. N. S. 141; see also 34 AM. L. REG. N. S. 638.

Elections, Nominations, Duty of Secretary of State

It is the duty of the secretary of state to certify to the county officers all nominations regularly presented to him; and if he refuses to do so, he may be compelled by mandamus. That remedy will still lie, though a statute prescribes a different remedy, if the time is so short that the latter would prove ineffective: *People* v. *McGaffey*, (Supreme Court of Colorado,) 46 Pac. Rep. 930.

In this case, the Silver Republican party in Colorado held a convention, adopted an emblem, and made nominations, which were duly certified to the secretary of state. The Republican convention subsequently held adopted the emblem formerly used by the party, and made nominations which were also duly certified. Both parties had state organizations. The secretary of state refused to certify the nominations made by the Republican party, on the ground that it was superseded by the Silver Republican party. The latter then applied to the Supreme Court for a mandamus to compel him to certify them, which was granted, on the ground that the secretary had no authority to determine which of the two conventions represented the Republican party; and that the remedy pro-

vided by petition was inadequate, because of the nearness of the election.

In passing upon objections to certificates of nomination, the secretary of state is not confined to mere formal matters relating to such certificates, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by a convention called and held according to party usage, and claiming in good faith to represent a political party which cast the requisite number of votes at the last election: *State* v. *Piper*, (Supreme Court of Nebraska,) 69 N. W. Rep. 378; *State* v. *Piper*, (Supreme Court of Nebraska,) 69 N. W. Rep. 384; following *State* v. *Allen*, 43 Neb. 651, 1895; *Phelps* v. *Piper*, 48 Neb. 724, 1896. But it is no part of the duty of the secretary of state or of the courts to decide which of two rival state conventions of the same party so called and held is entitled to recognition as the regular convention; and if two rival factions of a political party in good faith nominate candidates at conventions so called and held in accordance with the usages of the party, and certify such nominations to the secretary of state, he will certify to the county officers the names of the candidates nominated by each: *State* v. *Piper*, (Supreme Court of Nebraska,) 69 N. W. Rep. 378; following *State* v. *Allen*, and *Phelps* v. *Piper*, *supra*. This rule has also been adopted by the Supreme Court of Kansas: *Sims* v. *Daniels*, 46 Pac. Rep. 952; which further holds, that the officers appointed to consider objections to nominations have no power to consider and enforce a written agreement made by the candidates and committees of opposing factions of a political party, providing for the settlement of their differences, and for a determination of the question as to which set of candidates is entitled to be placed on the official ballot, and to use the party name. Such a special tribunal cannot consider or enforce an agreement of candidates to withdraw on the happening of a certain event or contingency, even though such agreement is in writing. The Supreme Court of California, however, in opposition to the previous consensus of authority, holds that when certificates of nomination are presented to the registering officer by each of two conventions claiming to represent

Rival Conventions

Agreements of Candidates

the same political party, it is for him to determine which represents the party, at least in the first instance: *McDonald* v. *Hinton*, 46 Pac. Rep. 870.

Nominating Convention, Regularity

When a person appointed by the county committee of a party to open and preside over a convention until the election of a temporary chairman refuses to recognize the authoritative character of the roll of delegates, but takes a *viva voce* vote on the question of the election of such chairman, and the majority of the delegates refuse to accept the chairman so elected, retire to another part of the house in which the convention is held, elect another chairman, and proceed to nominate candidates, the nominations so made are the regular nominees of the party, and their names are entitled to be placed on the official ballot, rather than those nominated by the delegates who remain under the first chairman: *French* v. *Roosevelt*, (Supreme Court, Special Term, New York County,) 41 N. Y. Suppl. 1080.

Ballots, Constitutional Law

The Supreme Court of Ohio has recently decided that the act of that state of April 17, 1896, (Laws, p. 185,) prohibiting the printing of the name of any candidate more than once on the official ballot, is constitutional: *State* v. *Bode*, 45 N. E. Rep. 195.

Distinguishing Marks

In *Cook* v. *Fisher*, (Supreme Court of Iowa,) 69 N. W. Rep. 264, the initial of a candidate was printed as "R." on the official ballots, instead of "A.," his correct initial. At the election, some of the ballots cast were corrected by the judges of election by writing "A." before the "R." with pencil, others by writing "A." over the "R." in pencil, and the rest by stamping an "A." over the "R." with a rubber stamp. It was decided that, though the change thus created by the different methods of correction was distinguishable, yet, as no ballot in any one of the classes bore any marks which would distinguish it from other ballots of the same class, the ballots were not illegal on the ground that they bore identifying marks.

It was also decided that though the ballot law of Iowa, which prescribes particularly the manner in which the official ballots shall be prepared, corrected, furnished and used, and

provided that no other ballots shall be used or counted, is mandatory in so far as it requires certain officers to prepare and issue them in the prescribed manner, it cannot be construed as mandatory on voters in so far as it provides that no other ballots shall be used or counted, so as to deprive them of their right to vote because the officers who print the ballots have made a technical mistake in printing the name of a candidate on the ballot; and that accordingly the changes made by the judges did not necessitate the rejection of the entire vote of the township, on the ground that those changes prevented the ballots from being "official" ballots, and consequently rendered them illegal.

Electric Light Wires, Negligence, Evidence

An electric light company is required to perfectly insulate its wires at points where persons are likely to come into contact with them, and to use the utmost care in doing so; and evidence that a person was injured by coming in contact with an electric light wire, and that the insulation of the wire had become defective at a joint, because the wrapping had become loosened, is conclusive proof that the company which maintained the wire was negligent in insulating it, if the wire is so situate that persons are liable to come in contact with it. *McLaughlin* v. *Louisville Electric Light Co.*, (Court of Appeals of Kentucky,) 37 S. W. Rep. 851.

Extradition, Trial for Different Offence, Principal and Accessory

In a recent case decided in the Circuit Court of Appeals, Eighth Circuit, *In re Rowe*, 77 Fed. Rep. 161, the petitioner was extradited from Mexico, upon an information charging that he had counseled and advised another to commit the crime of embezzlement of public moneys, and upon affidavits tending to prove the facts alleged, which the Mexican authorities held to show the commission of the crime, and that there were suspicions that R. was an accomplice in its commission sufficient to justify his arrest and trial. After his return to the state of Iowa, where the crime was committed, and from which he had fled, R. was indicted for embezzlement, as a principal; the statutes of the state, (McClain's Ann. Code Iowa, § 5699,)

having abolished the distinction between principals and accessories, and making all concerned in the commission of a crime alike principals. Being held for trial under this indictment, R. applied to the Circuit Court of the United States for discharge on *habeas corpus*, on the ground that he was held for trial for a different offence from that for which he was extradited. The Circuit Court refused the writ, on the ground that the offences were not different; and this decision was affirmed by the Circuit Court of Appeals.

Federal Courts, Jurisdiction, Citizenship

Judge Hanford, of the Circuit Court for the District of Washington, has lately ruled, that allegations in a petition for removal of a cause to that court, stating that the defendant has left the United States, and become permanently domiciled in the Dominion of Canada, now resides there, and intends to become a naturalized citizen of that country, does not show his alienage for the purpose of conferring jurisdiction on the federal court; since the mere fact that a defendant has, by removal from the United States, become a resident of a foreign country, does not make him a citizen thereof, for the purpose of federal jurisdiction: *Bishop* v. *Averill*, 76 Fed. Rep. 386.

Homicide, Defences

Another attorney has been found bold enough, (or ignorant enough,) to assail the common law rule that a person who has inflicted upon another a wound from which death may and does ensue cannot defend a charge of murder on the ground that the deceased might have recovered had he been treated according to the most approved surgical methods. Of course, the court refused to listen to his claim: *State* v. *Edgerton*, (Supreme Court of Iowa,) 69 N.W. Rep. 280.

Husband and Wife, Fraud on Rights of Wife

The Supreme Court of California has lately decided, that under Civil Code Cal. § 137, which authorizes a deserted wife to sue the husband for the maintenance of herself and of her children, if any, the wife is so far his creditor as to be within § 3439 of the Civil Code, which avoids conveyances made in fraud of creditors, and that a conveyance made by the husband with the

design of defeating the wife's right of maintenance is avoided thereby; and that it is immaterial that the transfer was made before marriage, when there had been a previous agreement of marriage, followed by cohabitation and pregnancy, which left the wife no alternative but to carry out the agreement: *Murray* v. *Murray*, 47 Pac. Rep. 37.

The court also held that it is within the general powers of a court of equity to grant the wife's claim for maintenance, irrespective of the statute; and that it might appoint a receiver at the beginning of the action, since the plaintiff's demand might be charged specifically upon the defendant's property.

Sale of Opium to Wife, Right of Action by Husband Against Seller

The Supreme Court of North Carolina has recently had before it a novel question. A husband brought an action for damages against a druggist, who, in violation of his express orders, sold laudanum and similar preparations to the wife, in consequence of which she became a confirmed victim of the opium habit, alleging the loss of her services and companionship. The court below sustained a demurrer to the complaint; but this was reversed on appeal: *Holleman* v. *Harward*, 25 S. E. Rep. 972.

The reasoning by which the court supports its decision is worth quoting: "A married woman still owes to her husband, notwithstanding her greatly improved legal status, the duty of companionship, and of rendering all such services in his house as her relations of wife and mother require of her. The husband, as a matter of law, is entitled to her time, her wages, her earnings, and the product of her labor, skill, and industry. He may contract to furnish her services to others, and may sue for them, as for their loss, in his own name. And it seems to be a most reasonable proposition of law that whoever wilfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship is liable to the husband in damages for his conduct. And the defendants owed the plaintiff the legal duty not to sell to his wife opium in the form of large quantities of laudanum as a beverage, knowing that she was, by using them, destroying her mind and body, and thereby causing loss to the husband.

The defendants and the wife joined in doing acts injurious to the rights of the husband. From the facts stated in the complaint, the defendants were just as responsible as if they had forced her to take the drug, for they had their part in forming the habit in her, and continued the sale of it to her after she had no power to control herself and resist the thirst; and that, too, after the repeated warnings and protests of the husband. There is no difference between the principle involved in this action and the principle upon which a husband can recover from a third person damages for assault and battery upon his wife."

There seems to be but one other case upon this subject: *Hoard* v. *Peck*, 56 Barb. (N. Y.) 202, 1867; but that agrees thoroughly with this.

Injunction, Restraining Distribution of Estate, Jurisdiction over Foreign Property

According to a late decision of the court of Appeals of New York, an injunction will lie at the suit of one claiming an interest in an estate by virtue of an agreement with certain of the heirs-at-law, and also with a devisee under the will, to restrain distribution under a foreign probate decree alleged to have been procured by some of the defendants by virtue of a fraudulent conspiracy, if part of the defendants appear, and is not shown that the other defendants have not been, or may not be. properly served with process, though the bulk of the property involved is in the state where the decree was rendered: *Davis* v. *Cornue*, 45 N. E. Rep. 449, reversing 37 N. Y. Suppl. 788. Bartlett, Gray and Haight, JJ., dissented.

Insurance, Casualty, Limitation

A claim against a casualty insurance company for disbursement for surgical aid to a person injured, and for the defense of an action by the person for the injuries, is governed by the same limitation as is prescribed by the policy for the losses arising under the policy, if no independent contract by the insurer to pay such claim is shown: *People* v. *American Steam-Boiler Ins. Co.*,

(Supreme Court of New York, Appellate Division, First Department,) 41 N. Y. Suppl. 631.

Interstate Commerce, Pooling of Traffic

It has been held by Judge Wheeler, in the Circuit Court for the Southern District of New York, that a combination of railroad companies into a joint traffic association, under articles of agreement by which each road carries the freight it may get over its own line, at its own rates, and has the earnings to itself, though providing proportional rates, or proportional division of traffic, is not a pooling of traffic on freights, or division of net proceeds of earnings, within the prohibition of the interstate commerce law, or of the Act of 1890, (26 Statutes at Large, 209), against unlawful restraints and monopolies; and that the United States cannot maintain a bill in equity to restrain an association of railroads from carrying into effect an agreement alleged to be illegal under the interstate commerce law, when it appears it did not grant the charter of any of the roads, and has no proprietary interest in them. Its right in such a case is to prosecute for breaches of the law, not to provide remedies: *United States* v. *Joint Traffic Assn.*, 76 Fed. Rep. 895.

Jurors, Disqualification

According to a decision of the Court of Appeals of Kentucky, a stockholder in a corporation that owns stock in another is disqualified to sit as a juror in a case in which the latter corporation is defendant: *McLaughlin* v. *Louisville Electric Light Co.*, 37 S. W. Rep. 851.

Justice of the Peace, Search-Warrant

The Chief Justice of England has recently laid down some very important principles with regard to the power of a justice of the peace to issue a search-warrant: *Jones* v. *German*, [1896] 2 Q. B. 418. In this case, the sworn information, upon which application for the warrant was made to the justice, stated that the informant "hath just and reasonable cause to suspect and doth suspect that W. J. has in his possession certain property belonging to the said T. W., (the informant,) and that he has

requested the said W. J. to allow him to search several boxes, which the said W. J. has had packed ready to be taken away, but which he refuses to be looked through." The justice issued the warrant, and it was executed. The plaintiff brought an action of trespass against the justice, alleging that the information was insufficient, and that the warrant was consequently illegal and without jurisdiction. The Chief Justice, who reserved the case for consideration after the jury had found for the plaintiff, held, that a search warrant may be issued on an allegation of reasonable suspicion of larceny; that it is not necessary in such an information to allege that a larceny has in fact been committed, but it is enough to allege a suspicion that a larceny has been committed; that it is not necessary to specify in the information the particular goods for which a search is desired; that the information in question substantially averred that the informant suspected that certain property of his had been stolen; and that it was sufficient to give the justice jurisdiction; and accordingly gave judgment for the defendant.

Libel, Newspaper, Corporation

The Court of Errors and Appeals of New Jersey has lately held, that when a corporation is engaged in publishing a newspaper, and it can be inferred from the evidence that a libelous article published therein has been edited and published by some person employed for that purpose, the corporation will be liable to the person libelled to the same extent that an individual would be who had personally made such a publication. "A corporation engaged in publishing a newspaper obviously must act by selected agents. Its directors or managers cannot formally pass on each publication, or determine what it to be admitted therein. Such determination is necessarily committed to its agents. In making such determination, they are acting within the scope of their employment. The intent with which they publish must be imputed to the corporation which employs them to make the publication of the newspaper. If the intent is malicious, the corporation must be liable therefor, as it is for other tortious acts of its agents, done within the scope of their authority, and

for the purposes for which the corporation was created and the agents were employed:" *Hoboken Printing & Pub. Co.* v. *Kahn*, 35 Atl. Rep. 1053.

Limitation, Accrual of Cause of Action

According to the Court of Appeals of Kansas, (Northern Department, W. D.,) a cause of action against an abstractor of titles for giving a wrong certificate of title accrues at the date of the delivery, and not at the time the negligence is discovered or the damage arises: *Provident Loan Trust Co.* v. *Walcott*, 47 Pac. Rep. 8.

National Banks, Security, Effect of State Laws

The Supreme Court of the United States has lately held, that Pub. Stat. Mass. c. 157, §§ 96, 98, invalidating transfers of property made with a view to preferring creditors by any one insolvent or in contemplation of insolvency, when that fact is known to the transferee, does not conflict with Rev. Stat. U. S. § 5137, which grants to a national bank the right to hold such real estate as "shall be mortgaged to it in good faith by way of security for debts previously contracted," and such as "shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings;" and that it does not impair any function of national banks as instrumentalities of the federal government. Such banks are therefore subject to the provisions of the Massachusetts statute: *McClellan* v. *Chipman*, 17 Sup. Ct. Rep. 85, affirming 159 Mass. 363.

Neutrality Laws, Expedition Against Friendly State

The Chief Justice of England has ruled, in *The Queen* v. *Jameson*, [1896] 2 Q. B. 425, under § 11 of the Foreign Enlistment Act, 1870, which provides that: "If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue: (1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall

be guilty of an offence," if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, that any British subject who assists in such preparation will be guilty of an offence, even though he renders that assistance from a place outside Her Majesty's dominions.

Public Officer, Liability for Public Moneys

The Court of Appeals of New York has adopted the strict rule, favored by the weight of authority, which holds that a public officer, on the ground of public policy, is liable for public moneys entrusted to him, and lost through the failure of the bank in which he had deposited them, though he was not negligent: *Tillinghast* v. *Merrill*, 45 N. E. Rep. 375, affirming 28 N. Y. Suppl. 1089.

Railroad Agreements, Specific Performance

According to a recent decision of the Supreme Court of Pennsylvania, a contract between railroad companies for interchange of traffic and apportionment of earnings is not so indefinite in its terms that it cannot be enforced, merely because the exact details by which each road shall receive and transport promptly the others' traffic, and the manner of apportioning the earnings on a mileage basis, cannot be particularized by the court: *Cumberland Valley R. R. Co.* v. *Gettysburg & Harrisburg Ry. Co.*, 35 Atl. Rep. 952. This is in accordance with the ruling of the Supreme Court of the United States, in *Union Pac. Ry. Co.* v. *C., R. I. & P. Ry. Co.*, 163 U. S. 564, 1896.

Railroad Relief Association, Validity of Release, Plea, Sufficiency

In *Chicago, Burlington & Quincy R. R. Co.* v. *Miller*, 76 Fed Rep. 439, the Circuit Court of Appeals for the Eighth Circuit lately ruled, that in an action against a railroad company by one of its employes to recover damages for personal injuries through negligence, a plea that the employe had accepted benefits as a member of a relief association organized by the company, under an agreement that he thereby relinquished his right of action, does not form a valid defence when it fails to show that, if the association was at any time short of funds to meet its obligations to a member, that member could main-

tain an action against the company, or fails to set out the arrangement between the company and its employes with such fullness and certainty that the court may be able to see that the arrangement is fair and reasonable, and not against public policy, nor voidable for want of valuable consideration.

The concurring opinion of Caldwell, Circuit Judge, is worth quoting: "Assuming that contracts of this character are valid, this case is rightly decided on the ground stated in the opinion. But such contracts, in so far as they attempt to release a railroad company from liability for injuries inflicted on its employes through its negligence, are without sufficient consideration, against public policy, and void, and must ultimately be so declared by all courts." This dictum, while not consonant with the weight of authority, seems founded in reason and justice, and will prevail in time. The current of opinion is just now setting the other way. See 34 AM. L. REG. N. S. 231.

Rewards, Offer by Municipal Corporation

The Supreme Court of Appeals of Virginia holds, in accord with the weight of decision, that in the absence of express authority conferred by charter or by general law, a municipal corporation has no power to offer and pay a reward for the arrest and conviction of persons who violate the criminal laws of the state; that such authority cannot be inferred from the "general welfare" clause of a charter, the matter being properly a subject of state and not of municipal jurisdiction; and that the offer by a city council of a reward which it has no authority to pay is *ultra vires*, and creates no obligation enforceable against the city: *City of Winchester* v. *Redmond*, 25 S. E. Rep. 1001.

Statutes, Enactment, Approval, Journals of Legislature

At last the use of the journals of the legislature has been acknowledged. In *State* v. *Wendler*, (Supreme Court of Wisconsin,) 68 N. W. Rep. 759, it appeared that in the laws of 1895, there were printed two statutes numbered 221 one on page 367, the other on page 397. The first was held invalid, because it differed materially from the engrossed bill. The second was

also held invalid, after a careful investigation into its legislative history, because (1) the record did not show that the legislature ever passed it, and (2) because the governor never approved the bill which the legislature attempted to pass, the statute as approved and printed containing amendments which had been stricken out by a conference committee of the two houses.

If this decision is correct, the doctrine of the sacredness of an enrolled and approved bill is nugatory; if that doctrine is valid, this decision is wrong. But it needs no microscope to discover on which side justice lies, when the eyes are freed from the dust of legal quibbling.

The Supreme Court of North Carolina also, has recently backed water very strongly in regard to the sacredness of an enrolled bill. It now holds that when a state constitution requires, in the enactment of certain laws, that the yeas and nays shall be entered on the journals, those journals are conclusive, not only as against a printed copy of the statutes published by authority of law, but as against a duly enrolled act: *Union Bk. of Richmond* v. *Commissioners of Town of Oxford*, 25 S. E. Rep. 966.

Statutes, Enactment, Legislative Journals, Effect

This is a very important recession from the position apparently taken in *Carr* v. *Coke*, 116 N. C. 223, 1895, which provoked a good deal of discussion about a year ago. The court seems to feel that such is the case; for it takes great pains to point out the distinction between the two cases, and carefully limits the effect of that decision. "This case has no analogy to *Carr* v. *Coke*, 116 N. C. 223, 22 S. E. 16. That merely holds that when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house, and ratified: Const. art. 12, § 23, and so it is here; the certificate of the speakers is conclusive that this act passed three several readings in each house, and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each house, and that the yeas and nays were entered in the journals. The journals were in evidence, and showed affirmatively to the contrary." This opinion was delivered by one

of the judges who dissented in *Carr* v. *Coke*, and may therefore be taken as authoritative as to the extent of that decision. We are glad to know what it does mean; for the language used was broad enough to cover anything—as broad as charity.

Amendment of Repealed Statute

The Supreme Court of Indiana, following *Boring* v. *State*, 141 Ind. 640, 1895, holds that a statute which purports to amend a repealed statute is *pro tanto* unconstitutional; but that if the rest of the act can stand alone, it will be valid: *Smith* v. *McClain*, 45 N. E. Rep. 41.

The doctrine that the amendment of an act already repealed by a prior amendment is a nullity, on the grounds (1) that it is a nullity, as an attempt to amend that which has no existence, and (2) that if it be attempted to uphold it as an amendment of the amendatory act, it does not comply with the constitutional provision that an amendment shall refer to the original act by its title, seems to be peculiar to Indiana, where it has been persistently adhered to: *Draper* v. *Falley*, 33 Ind. 465, 1870; *Board* v. *Markle*, 46 Ind. 96, 1874; *Blakemore* v. *Dolan*, 50 Ind. 194, 1875; *Ford* v. *Booker*, 53 Ind. 395, 1876; *Cowley* v. *Rushville*, 60 Ind. 327, 1878; *Niblack* v. *Goodman*, 67 Ind. 174, 1879; *Brocaw* v. *Board*, 73 Ind. 543, 1881; *Lawson* v. *Deblois*, 78 Ind. 563, 1881; *McIntyre* v. *Marine*, 93 Ind. 193, 1883; *Feibleman* v. *State*, 98 Ind. 516, 1884; *Boring* v. *State*, 141 Ind. 640, 1895; *Stony Creek Twp.* v. *Kabel*, (Ind.) 43 N. E. Rep. 559, 1896. This view wholly disregards the obvious reply that the amendment may stand as an independent enactment, at all events, the purpose to amend being rejected as surplusage, and that the reference to the title of the original act sufficiently indicates a purpose to amend that which takes its place, the date being mere surplusage; accordingly, most other courts have taken a common sense view of the situation, holding that the evident intention of the legislature is to amend the amendatory statute; and therefore that the date of the act as stated should be rejected as surplusage: *State* v. *Warford*, 84 Ala. 15, 1887; *Harper* v. *State*, (Ala.) 19 So. Rep. 857, 1896; *Bassett* v. *Jacksonville*, 19 Fla. 664, 1883; *Comm.* v. *Kenneson*,

143 Mass. 418, 1887; *People* v. *Upson*, 79 Hun, (N. Y.) 87, 1894; or that an amendment does not repeal the amended act so as to preclude its re-amendment: *Fletcher* v. *Prather*, 102 Cal. 413, 1894; *State* v. *Brewster*, 39 Ohio St. 653, 1884. Of course, in such a case the prior amendment is repealed by the latter: *Wilkinson* v. *Ketler*, 59 Ala. 306, 1877; *Blake* v. *Brackett*, 47 Me. 28, 1859; *Kamerick* v. *Castleman*, 21 Mo. App. 587, 1886. An express repeal of the original statute repeals the amendment: *Greer* v. *State*, 22 Tex. 588, 1858.

Street Railroads, Transfer, Refusal, Penalty

The Supreme Court of New York, (Appellate Division, Second Department,) has very wisely decided, that the penalty for refusal to give a transfer to "any passenger desiring to make one continuous trip" between any two points on a street railroad system, imposed by the Laws of New York of 1892, c. 676, § 104, cannot be recovered by one who demanded a transfer with the sole object of recovering for refusal: *Meyers* v. *Brooklyn Heights R. R. Co.*, 41 N. Y. Suppl. 798.

Torts, Joinder of Actions

A joint action will not lie against the separate owners of dogs which unite in destroying the property of a third person. Each person is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him. This rule applies to all cases of trespass by animals. "The reason which makes one who personally aids in or about the wrong done by another liable for the whole amount of the injury done, does not apply in a case like that under consideration. In the case of a joint tort, each offender's liability arises out of the fact that his participation in the wrongful act was voluntary and intentional; and the law, as a punishment for his wrongdoing, as well as for the protection of the rights of the injured party, makes him answerable for all the consequences of that act. But, in the case of animals which wander off and unite in perpetrating mischief, there is no actual culpability on the part of their owners. Liability in such a case only exists by reason

of the negligence of the owners in permitting their animals to stray away and commit the depredations, and it has therefore always been held, when the question has come before the courts, that joint action will not lie against separate owners of dogs which unite in committing mischief:" *State* v. *Wood*, (Supreme Court of New Jersey,) 35 Atl. Rep. 654; citing *Denny* v. *Correll*, 9 Ind. 72, 1857; *Buddington* v. *Shearer*, 20 Pick. (Mass.) 477, 1838; *Van Steenburgh* v. *Tobias*, 17 Wend. (N. Y.) 562, 1837; *Auchmuty* v. *Ham*, 1 Denio, (N. Y.) 495, 1845; *Partenheimer* v. *Van Order*, 20 Barb. (N. Y.) 479, 1855; *Adams* v. *Hall*, 2 Vt. 9, 1829.

Trust, Following Trust Property, Life Insurance, Premiums Paid with Stolen Money

The beneficiary in a life insurance policy procured with stolen moneys is not an innocent third person as against the person from whom the moneys were stolen, but takes the policy subject to the means by which it was procured; and when the premiums on a policy are paid with stolen moneys, and the amount of the thefts equal the amount of the policy, the person from whom the moneys were stolen is entitled to the proceeds of the policy: *Dayton* v. *H. B. Claflin Co.*, (Supreme Court, Trial Term, New York County,) 41 N. Y. Suppl. 839.

Usury

When a loan, payable in monthly instalments, including interest due at the time of payment, is made at the highest legal rate of interest, and notes are given for each instalment, including the interest due at the maturity of each note, the fact that the notes provide for interest after maturity in case of default does not render the loan usurious, since, if the notes are paid at maturity, the contract is legal, and therefore the default of the borrower will not make it illegal: *Crider* v. *San Antonio Real Estate, Bdg. & Loan Assn.*, (Court of Civil Appeals of Texas,) 37 S. W. Rep. 237.

In a proceeding in equity to remedy a mistake made by the

foreman of the jury in announcing the verdict, the jurors are competent witnesses to prove that the verdict as read out by the foreman was not their verdict, but the result of an oversight on his part: *Hamburg-Bremen Fire Ins. Co.* v. *Pelzer Mfg. Co.*, (Circuit Court of Appeals, Fourth Circuit,) 76 Fed. Rep. 479.

Verdict, Evidence of Jurors

According to a recent decision of the Supreme Court of Illinois, a parol contract to make no will that will deprive one of property which she would take as heir if there was no will, having relation to real estate and personalty and being within the statute of frauds as to the former, is indivisible, and therefore wholly void; and the legal adoption by a grandmother of her deceased son's only daughter, as her own child, is not such a part performance as will take such a contract out of the statute: *Dicken* v. *McKinlay*, 45 N E. Rep. 134.

Will, Contract not to make, Statute of Frauds, Part Performance

In another case before the same court, *Lawrence* v. *Smith* 45 N. E. Rep. 259, a testator had bequeathed the bulk of his estate upon trusts which were declared void as violating the rule against perpetuities. By a clause in the will he disinherited one of his children; but it was held that that disheritance could not affect the right of the child to share in that portion of the estate as to which, by reason of the invalidity of the trust, the testator died intestate.

Disinheritance, Void Trusts, Right of Child

The Court of Appeals of Colorado has lately held that when a corporation maintains a hospital for the treatment of its employes, which is supported, either in whole or in part, by contributions reserved from the wages of the employes, the relation of physician and patient exists between the surgeon in charge of the hospital and an employe, who is treated by him for an injury; and the surgeon is therefore not competent to testify, except with the consent of the

Witness, Competency, Physician and Patient, Privileged Communication, Relief Hospital

patient, as to any information regarding the injury acquired by reason of his attendance on the patient: *Colorado Fuel & Iron Co.* v. *Cummings*, 46 Pac. Rep. 875.

Ardemus Stewart.